United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-1346

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN DAVID HUGHEY, III,

Appellant.

----------x

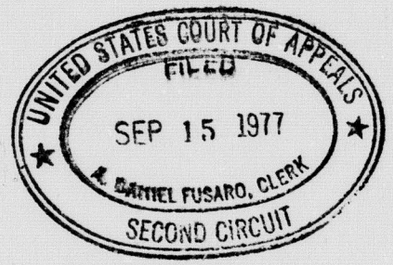
Calendar Number

Docket No. T-7748

B

P/S

BRIEF FOR APPELLANT
AND APPENDIX



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BRIEF FOR APPELLANT AND APPENDIX

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Preliminary Statement

This is an appeal from a decision and order of Judge Thomas P. Griese of the Southern District of New York entered on July 22, 1977 denying a criminal defendant's pre-trial motion to dismiss indictment number 76Cr496 on grounds of double jeopardy. The opinion of the district court is not reported but consists of pages 17-27 of the transcript of proceedings of July 22, 1977. This appeal is taken pursuant to 28 USC section 1291.

Questions Presented

1. Is a recalcitrant trial witness adjudicated in criminal contempt where the sentence is "for the duration of the trial" with no purge clause?

2. Is such a contempt adjudication so ambiguous as to defy precise characterization?

3. Did the district court err in denying appellant's motion to dismiss on double jeopardy grounds?

TABLE OF CASES AND AUTHORITIES

Abney v. United States, ___ U.S. ___, 97 S.Ct. 2034 (1977) -- 6, 7

Carbon Fuel Co. United Mine Workers, 517 F.2d 1348 (4th Cir. 1975) -- 10

Clark v. Boynton, 362 F.2d 992 (5th Cir. 1966) -- 13

Colondo v. New York, 405 U.S. 9 (1972), 400 U.S. 16 (1970) -- 9, 10

Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911) -- 6

Green v. United States, 355 U.S. 183 (1957) -- 14

International Business Machines Corp. v. United States, 493 F.2d 112 (2nd Cir. 1973) cert. denied 416 U.S. 995 (1974) -- 7, 8

Menna v. New York, 423 U.S. 61 (1975) -- 9, 10

Shillitani v. United States, 384 U.S. 364 (1964) -- 7, 10

Skinner v. White, 505 F.2d 685 (5th Cir. 1974) -- 13

Southern Railway Company v. Lanham, 403 F.2d 119 (5th Cir. 1968) -- 8

United States v. DeMauro, 441 F.2d 28 (8th Cir. 1971) -- 8

Matter of Williams, 509 F.2d 949 (2nd Cir. 1975) -- 10

28 United States Code Section 1826 -- 11

18 United States Code Section 401 -- 11, 12

Statement of the Case

On May 21, 1976 appellant John David Hughey III was indicted in the Southern District of New York for one count of criminal contempt pursuant to 18 USC section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The indictment alleges, in sum, that on September 22, 1975 Hughey, after being granted immunity refused to testify as a prosecution witness at the trial of United States v. Swinton, 70 Cr 230, which had commenced before Judge Milton Pollack and a jury.

Hughey had been convicted in 1970 of conspiracy to destroy government property under the same indictment. He had been sentenced pursuant to the Youth Corrections Act by Judge Pollack, served two years in jail, completed parole and had had his conviction set aside pursuant to 18 USC section 5021 on August 20, 1974.

Patricia Swinton was named as a co-conspirator of Hughey's in the indictment but was not apprehended until March 13, 1975. Her trial began on September 22, 1975 and Hughey, under subpoena from the prosecution, was called to the witness stand immediately prior to jury selection. (App. 1, 8)* He took the Fifth Amendment in response to questioning by the prosecutor and was thereupon granted immunity and questioned again. When he refused to answer the prosecutor's questions,

---

*All references in this brief are to page numbers of the appendix which consists of the transcript of the proceedings before Judge Pollack and the transcript of the oral opinion of the district court.

Judge Pollack warned him as follows:

> Mr. Hughey, the Court rules that you have been given adequate immunity and are not entitled to assert the grounds for refusal to testify. The Court further rules and calls to your attention that it may summarily order you into confinement in civil contempt as a witness who refuses without just cause to comply with an order of the Court to testify and I am now directing you to answer that question.
>
> I further wish to call to your attention the fact that an obstruction of justice if claimed by the government to arise from your refusal and failure to testify at a trial may result in the prosecution of a criminal contempt charge. (App. 7)

Hughey was then excused and recalled after the jury was selected. He was immediately warned by Judge Pollack, this time in the following language:

> ...you are to be required to respond to proper questions that are allowed by the Court with the advise that the law provides sanctions to be imposed on those who disobey a court order and that those sanctions may include if obstruction of justice is claimed by the

> government and found by the Court, not only the civil contempt for disobedience of the co order but possibly also criminal contempt; that for a civil contempt you may be committed to the custody of the Attorney General or his authorized representative for the duration of the trial; that for a criminal contempt you may be committed for period of up to 18 months in prison, six months by action of the Judge with a jury or the longer period on a jury trial of the issue of criminal contempt. (App. 10, 11)

When Hughey again refused to answer the prosecutor's questions, he was ordered to answer them by Judge Pollack. (App. 12-14) When he refused to change his position Judge Pollack found him in contempt and sentenced him as follows:

> I accordingly adjudge the witness in contempt and I direct that he be confined forthwith for the duration of the trial. (App. 14)

Pursuant to Judge Pollack's order, Hughey remained incarcerated until shortly after the Swinton jury returned its verdict on September 26, 1977.

A motion to dismiss the indictment on double jeopardy grounds was made by Hughey before the district court, Judge

Thomas P. Griese. Hughey asserted that because Judge Pollack's order contained absolutely no provision by which Hughey could secure his release from jail, it was criminal rather than civil in nature and substance.

The district court denied the motion to dismiss in an oral opinion on July 22, 1977 holding that the contempt adjudication by Judge Pollack was civil. Acknowledging that Judge Pollack had not expressly ordered that Hughey could reduce or eliminate the penalty by obeying the order, the district court relied instead on a) Judge Pollack's characterization of the proceedings as civil and b) Judge Pollack's warnings to Hughey of possible civil and criminal sanctions for refusing to testify.

The Notice of Appeal was filed on July 28, 1977 and no trial date has been fixed pending disposition of this appeal.

POINT I

A CIVIL CONTEMPT SENTENCE MUST BE CONDITIONAL; THE UNCONDITIONAL SENTENCE IMPOSED UPON APPELLANT MAKES HIS CONTEMPT ADJUDICATION CRIMINAL.

The unique aspect of civil contempt which sets it wholly apart from criminal contempt is, as noted by the district court, (App. 18) that the subject of the contempt has the keys to the jail in his hands. Without these keys, as they are expressed in the conditional nature of the contempt order (the so-called "purge clause"), the contempt is not civil, but criminal. Gompers v. Buck's Stove and Range Co., 221 US 418 (1911). The Court there said:

> (I)mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.
>
> * * *
>
> If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key... Such imprisonment operates not as a remedy coercive in its nature, but as punishment for the completed act of disobedience.
>
> * * *

> The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment. (221 U.S. at 441, 442, 443)

In Shillitani v. United States 384 U.S. 364 (1966) the Court reaffirmed the distinction drawn in Gompers stating that a contempt order "must be viewed as remedial if the court conditions release upon the contemnor's willingness to comply." Id. at 370. Shillitani involved two grand jury witnesses who refused to testify after being granted immunity. Each was proceeded against under Rule 42(b) of the Federal Rules of Criminal Procedure and found guilty of contempt. The sentence was imprisonment for two years "or until the further order of this court. Should...(the witnesses) answer those questions before the expiration of said sentence, or the discharge of said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment." Quoted in 384 U.S. at 366.

The Supreme Court held that these sentences were conditional, and therefore civil, 384 U.S. at 365, noting that "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence..." Id. at 370, fn.5.

This Circuit has closely followed Gompers and Shillitani on this point in International Business Machines

Corp. v. United States, 493 F.2d 112 2d Cir. 1973), cert. denied 416 U.S. 995 (1974). There the district court had held IBM in contempt for failure to comply with a certain pre-trial discovery order in a pending civil anti-trust suit and ordered a fine of $150,000 per day until IBM complied with the order. IBM's efforts to test the contempt and claims of privilege on the withheld discovery turned on whether the district court's order was for criminal contempt (and therefore appealable) or for civil contempt (and not appealable).

In rejecting IBM's argument that the order was criminal this Court stated:

> The hallmark of civil contempt is that the sanction is only contingent and coercive. Id. at 115.

Because the district court had explicitly provided that IBM is "entitled to purge itself of this contempt at any time" by compliance with the order, the order was held to be coercive and contingent, in other words, conditional. Ibid. Compare Southern Railway Company v. Lanham 403 F.2d 119 (5th Cir. 1968).

In United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971) the criminal nature of the proceeding was affirmed because the sentences were not conditional. Three grand jury witnesses refused to testify after being granted immunity, were proceeded against by an information and afforded a trial by jury. Upon conviction for contempt, each defendant was

sentenced to three years imprisonment with the district court adding that if the defendants testified prior to the expiration of the grand jury's term or the 120 day period of Rule 35, it would take that factor into account in a motion to reduce under Rule 35. Each defendant subsequently testified and had his sentence reduced to three years probation.

The key element in each of the cases cited above was the specific language of the contempt order or decree imposing punishment and the presence (or absence) therein of language making the sentence conditional. In the instant case there is manifestly no conditional language in Judge Pollack's order. Hughey was sentenced "for the duration of the trial" and no purge clause was added to his sentence providing for release upon his choosing to testify. It is the absence of conditional language which makes the prior adjudication criminal contempt for the keys to the jail cell, by the explicit orders of Judge Pollack, were never placed in Hughey's pocket.*

Because the prior proceeding was criminal and based on exactly the same factual allegations as the present indictment, double jeopardy prohibits the prosecution and the indictment should be dismissed. Colombo v. New York 405 U.S. 9 (1972), 400 U.S. 16 (1970); Menna v. New York 423 U.S. 61 (1975).

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*The implication of the district court's finding that because Hughey had determined not to testify, Judge Pollack's extending him a right to purge the contempt was academic is treated in Point III, infra.

POINT II

THE CONTEMPT ADJUDICATION AND THE RECORD ARE AT BEST AMBIGUOUS AND CONFUSED; APPELLANT SHOULD RECEIVE THE BENEFIT OF THE DOUBT.

A court's (or party's) characterization of a contempt order as civil or criminal is neither conclusive nor binding as to the actual nature of the order. In Menna v. New York, supra, the Court found the contempt adjudication criminal although the lower court had characterized it as civil. Similarly, in Shillitani v. United States, supra at 369, the Court expressly stated that a court's characterization of a contempt is neither conclusive nor binding. This Court, as well, has taken the same view in Matter of Williams, 509 F.2d 949, 958 (2nd Cir., 1975), and the Fourth Circuit has had occasion to make explicit comment, Carbon Fuel Co. v. United Mine Washers 517 F.2d 1348, 1350 (4th Cir. 1975).

> We consider of no moment that the proceedings were begun and designated as a civil contempt proceeding. The nature of the fine imposed determines that character of the proceedings without regard to the characterization of the proceedings, either procedurally or substantially, as made by the parties themselves.

The reliance by the district court in this case on Judge Pollack's (or anyone else's) characterization of the proceedings would appear to be misplaced.

Similarly, the district court's reliance on the warnings of possible civil and criminal contempt sanctions

against Hughey as indicative of the nature of the proceedings is misplaced for the warnings only served to create confusion and ambiguity.

In advising Hughey of the possible sanctions that could be imposed "on those who disobey a court order" (App. 10) Judge Pollack first informs him "that for a civil contempt you may be committed to the custody of the Attorney General or his authorized representative for the duration of the trial; (App. 10, 11) and then advises him, "that for a criminal contempt you may be committed for a period of up to eighteen months in prison" (App. 11).

The first warning, regarding civil contempt, sounds very much in criminal contempt as it describes the sanction in definite terms ("for the duration of the trial") and is silent (as is the whole record) as to any right to purge by compliance with the Court's order. The second warning, regarding criminal contempt, sounds very much in civil contempt, in that the sanction refers to "eighteen months" as the maximum allowable sentence. Eighteen months is, of course, the usual maximum civil confinement for refusal to testify before a federal grand jury. 28 U.S.C. section 1826, the criminal contempt statute, 18 U.S.C. section 401, provides for an unlimited fine or jail term.

Judge Pollack's contempt order itself is completely unconditional, remanding Hughey "for the duration of the trial"

and extending no right to purge by complying with the Court's order, (App. 14), an order consistent with criminal contempt. It should be noted here that Judge Pollack never referred to any specific statute throughout the entire proceeding against Hughey. (App. 20)

Finally, each time Judge Pollack mentioned criminal contempt he said it would apply if "obstruction of justice" were claimed by the prosecution. (App. 7, 10, 14). The criminal contempt statute, 18 U.S.C. section 401 (1948)*, provides three bases for proceedings on criminal contempt, only one of which includes obstruction of justice in explicit terms. 18 U.S.C. section 401(1) Indeed, the present indictment has been brought pursuant to 18 U.S.C. 401(3), resisting a lawful court order, rather than obstruction of justice.** In this context it is important to note that during the second of

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*"Section 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

**A pre-trial motion to dismiss the indictment on this ground was denied by the district court.

his two warnings to Hughey, Judge Pollack stated that the "civil" contempt could be imposed for "disobedience of the court order" (App. 10), language found in 18 U.S.C. section 401 and not in 28 U.S.C. section 1826.

Thus it appears that even Judge Pollack may have been confused, if not over the type of contempt he intended to find, then certainly over the elements constituting the different sanctions appropriate to civil and criminal contempt.

As argued in Point I, supra, Hughey contends that the express language of Judge Pollack's contempt order should be determinative of the nature of the subject contempt. However, we note that another possibility exists: that the confusion and ambiguity of the record made by Judge Pollack in his various statements and warnings is such as to make a clear determination of the type of contempt impossible. In this circumstance, the resolution of the ambiguity must be in Hughey's favor.

Cases have arisen where it has been held that a contempt order having features of both civil and criminal contempt may resist any effort to identify it as one or the other. Clark v. Boynton, 362 F.2d 992 (5th Cir., 1966); followed in Skinner v. White, 505 F.2d 685 (5th Cir. 1974). In Clark v. Boynton, supra, the contemnor was held in contempt for violating an injunction restraining interference with voter registration and fined

$1500. Because the contempt order and the record surrounding it had contradictory features which pointed to both civil and criminal contempt, the court was compelled to state:

> The simple fact is that no one, simply no one, is able to determine whether this was begun, tried or ended as a case for criminal contempt, civil contempt, or both, or whether some place down the trail, begun as one it transmuted into the other. This is, of course, one thing about which there may not be any doubt if a contempt order is to stand. 362 F.2d at 994.

The issue of who receives the "benefit" of the ambiguity in the instant case should be resolved on the side of Hughey. To find that the initial contempt is so ambiguous as to defy clear identification, but then to hold that Hughey may nevertheless be tried criminally, is, in effect, to find the first contempt civil and would be inherently contradictory to the finding of ambiguity. On the other hand to find that because the initial contempt is ambiguous Hughey may not be tried criminally is simply to recognize that a criminal defendant must be protected from the possibility of being twice put in jeopardy.

There is little doubt of the profound importance the Supreme Court has attached to the protection against double jeopardy. Indeed, that the instant pre-trial appeal has been found permissible is a significant recognition of this fact. Abney v. United States, — U.S. — , 97 SCt. 2034 (1977).

In Green v. United States, 355 U.S. 183,198(1957),

Justice Black articulated the special esteem in which this constitutional safeguard is to be held:

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

The one clear aspect to the instant case is that Hughey was sentenced to and served time in jail for some kind of contempt. To deny the government the opportunity to incarcerate him yet a second time for the same transaction (and for a third time on proceedings growing out of a single indictment) cannot be said to be prejudicial. However, to permit a criminal prosecution on the theory that the original contempt may have been either civil or criminal is to risk doing an injustice of constitutional proportions.

Consequently, should this Court find that the nature of Judge Pollack's order adjudging Hughey in contempt cannot be clearly determined from the record, it should reverse the district court with directions to dismiss the indictment.

POINT III

THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS THAT THE 'RIGHT TO PURGE' WAS ACADEMIC ARE IRRELEVANT AND ERRONEOUS

That the District Court would find extending Hughey a right to purge was academic (App.22,24) because he had determined not to testify in any event is both confusing and disturbing. First, it is entirely inconsistent with the conclusion that, as a matter of law, such extrinsic factors are immaterial in determining the nature of the contempt order (e.g. App.24). The District Court appears to be influenced by these factors in spite of its statement to the contrary.

Secondly, to hold that any right, and particularly one upon which an individual's freedom may rest, is academic because the person to whom it would ordinarily be extended may choose not to exercise it, holds disturbing implications. Should a criminal defendant not be advised of the right to counsel because he has previously announced his determination to proceed pro se? Is the right to remain silent academic because a court has found that it is the defendant's intention to testify? Such motions would be considered repugnant to our system of justice.

Third, the inquiry itself into Hughey's knowledge of the right to purge disregards the holdings of the basic

contempt cases cited in Points I and II, supra, that it is the nature of the court's order which controls the determination of the form of contempt. Were the contemnor's knowledge or understanding of what the court intended or meant to be controlling, the decision making process would be placed in the hands of each witness.

Moreover, the presence of counsel assures only that the contemnor will have an interpreter for what counsel thinks the court means. Particularly here, with Judge Pollack's references to various civil and criminal elements in a confusing and ambiguous fashion, counsel's advice cannot be said to substitute for the court's order.

Finally, though concededly not material to this Court's determination of the instant appeal, the District Court's finding that Hughey was determined not to testify "in any event" is inconsistent with the conclusion that Judge Pollack's contempt order was civil. In effect, such a finding is entirely consistent with a determination that confinement would have no coercive effect, and would therefore be utilized to punish the contemnor for his disobedience. This finding together with the fixed period of confinement, and the absence of any purge clause, requires a determination that Judge Pollack's order of contempt was, objectively, criminal.

It is Hughey's position, concurred in by the prosecution in the District Court, that the decision on this double jeopardy motion should be determined solely on the basis of the record before Judge Pollack. We submit that any findings regarding Hughey's knowledge or his counsel's knowledge of the right to purge are irrelevant to the proper determination of Hughey's double jeopardy claim and this appeal.

CONCLUSION

For the foregoing reasons, the District Court's order should be reversed and the indictment dismissed.

Dated: New York, New York
September 15, 1977

Respectfully sumbitted,

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APPENDIX

1. Transcript of proceedings before Hon. Milton Pollack, September 22, 1975 (Hughey only) . . .1-15

2. Stipulation Settling Record on Appeal 16

3. Oral opinion of the District Court (Hon. Thomas P. Griese) July 22, 1977 17-26

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U.S. District Court
Filed
May 5, 1976
S.D. of N.Y.

jbbr 1

United States of America

v. 70 Cr. 230

Patricia Elizabeth Swinton

New York, New York

September 22, 1975

THE COURT: ARe you ready to proceed?

MR. CUTNER: Yes, your Honor.

THE COURT: Go ahead.

MR. CUTNER: The government calls John David Hughey as a witness.

J O H N D A V I D H U G H E Y III, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUTNER:

MR. STOLZAR: Would you have any objection if I stand next to Mr. Hughey?

THE COURT: You can sit in the jury box, if you wish.

Q Mr. Hughey, I am showing you the indictment in this case and it is 70 Cr. 230.

I ask you if you are the same John David Hughey named in that indictment.

5-6-71

jbbr 2 Hughey-direct

A I am taking the Fifth Amendment in this on the ground that I might incriminate myself.

THE COURT: Well, Mr. Hughey, you pleaded guilty to that indictment and a plea of guilty to an indictment eliminates any Fifth Amendment privilege.

MR. STOLZAR: Judge Pollack, if I may be heard with respect to that, Mr. Cutner has informed me that the government believes that Mr. Hughey lied to an FBI agent and he is therefore subject to prosecution under 1001 for purportedly lying to an FBI agent.

Because of that, I do not believe that Mr. Hughey

can answer any questions unless he is guaranteed immunity based on his testimony.

THE COURT: The ball is in your court, Mr. Cutner.

MR. CUTNER: Well, your Honor, the government has authority from the Attorney General to apply for immunity for Mr. Hughey and I have Mr. Curran's application to the Court which I handed up at this time.

MR. STOLZAR: Do you have a copy for counsel.

MR. COHN: Do you have a copy for counsel for Miss Swinton?

(Documents handed to Messrs. Stolazr and Cohn.)

THE COURT: There has been handed to the Court an application by the United States Attorney for authorization

to compel the witness, John David Hughey, to give testimony which he refuses to give on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before this court in the trial of indictment 70 Criminal 230.

Appended thereto is the duly executed authorization from the offices of the Deputy Attorney General executed by Harold R. Taylor, Jr., Deputy Attorney General, approving the application pursuant to the authority vested in the signer by Title 18 of United States Code, Section 6003.

Accordingly the application to this court based on the judgment of the United States Attorney that the testimony from John David Hughey may be necessary to the public interest; the Court will order --

MR. STOLZAR: Judge, before you --

THE COURT: That -- that John David Hughey give testimony which he refused to give on the basis of his privilege against self-incrimination, as to all matters about which he may be interrogated before this Court in the trial of inidctment 70 Criminal 230, pursuant to USC Section 6002.

MR. STOLZAR: Prior to the time you sign the order, I would like to raise two things, maybe three. One is that I do not believe and I believe there is a valid

argument to be made which has not been decided in this circuit, that immunity under 18 US 6002, the so-called use immunity statute is not co-extensive with Mr. Hughey's Fifth Amendment privilege. The reason is that the statute contains an exception which authorizes the use of testimony in any prosecution for giving perjury, false statement or false declaration. The statute does not limit, as does every other immunity statute which Congress has passed, does not limit that to false declarations, false statements or perjuries committed during the course of giving the immunized testimony.

Secondly, the government asserts on the affidavit of Paul J. Curran, that the testimony of John David Hughey is necessary to the public interest without providing any material facts to indicate to the Court why they believe his testimony is necessary to the public interest.

And I believe that all things being considered, Mr. Hughey's testimony is not necessary to the public interest and it is not necessary for a grant of immunity to be given by the Court and I would ask the Court to exercise some discretion in refusing that.

MR. COHN: May it please the Court. From the defense point of view, your Honor, I wonder whether there is a relevant witness. If he is called for flight, to prove

jbbr 5 Hughey-direct

flight. I advise the Court that the defense intends to concede flqiht at trial.

THE COURT: The Court will accept the judgment of the United States Attorney with regard to the public interest involved and I have signed the order.

MR. STOLZAR: Judge, I would ask you to amend the order in one fairly important respect and that is, there are tremendous difficulties involved when use immunity is granted in tracking down whether a subsequent prosecution is or is not tainted by the testimony given from the witness stand. I would ask, therefore, that the government give to the Court such evidence as it has against Mr. Hughey which consists of its file or which indicates to them that Mr. Hughey has committed a crime on a prior occasion, to wit, asserting certain things to an FBI agent in an interview in December of 1974. I would ask that that certification be done in a seal; whether the Court examines it or not is of no moment but I believe it should exist so that any subsequent prosecution, if any, will be protected from the taint of the immunized testimony.

THE COURT: The order will stand as signed.

Proceed.

I think that before you proceed, Mr. Cutner,

I will ask Mr. Stolzar to advise the witness of the legal and factual significance of the legal proceedings which have just been taking place so that he is amply aware of the situation.

You may step down, Mr. Hughey, and talk to your lawyer.

MR. CUTNER: May I just add, your Honor, that the conversation that Mr. Stolzar refers to where I advised him that in the government's opinion Mr. Hughey had lied to the FBI, that conversation is the subject of an affidavit which I filed in this court on May 12th of this year and I state in the affidavit and I state now to the Court that we had no interest in prosecuting Mr. Hughey on those facts and we have none now and I represent that to the Court as I did to Mr. Stolzar at the time.

MR. STOLZAR: Judge, I would only say in response --.

THE COURT: I don't think it needs any response. I have signed the order. Let's go ahead.

(Pause.)

THE COURT: Have you had an ample opportunity to be advised by your counsel, Mr. Hughey?

THE WITNESS: Yes, I have.

THE COURT: Thank you. You may sit down.

jbbr 7 Hughey-direct

BY MR. CUTNER:

Q. Mr. Hughey, showing you again the indictment in this case, 70 Criminal 230, I ask you if you are the same John David Hughey III who is named in that indictment?

A. I don't want to answer any questions or testimony for the reasons that I gave in my motion to quash the subpoena. And also because I have been advised that the immunity that the government is granting me may not protect me against fuure indictments.

THE COURT: Mr. Hughey, the Court rules that you have been given adequate immunity and are not entitled to assert the grounds for refusal to testify. The Court further rules and calls to your attention that it may summarily order you into confinement in civil contempt as a witness who refuses without just cause to comply with an order of the Court to testify and I am now directing you to answer that question.

I further wish to call to your attention the fact that an obstruction of justice if claimed by the government to arise from your refusal and failure to testify at a trial may result in the prosecution of a criminal contempt charge.

It may also be that in the event thatyou do testify at the trial you may be cross examined by an attorney

who may formerly have represented you, Mr. Cohn, or you may be cross examined by Miss Levinson, the co-counsel in this case, wh did not represent you.

In the event that it were either or both of those lawyers to cross examine you, you are informed that there has been an unconditional, flatfooted waiver entered upon the record of this case by the defendant, Patricia Elizabeth Swinton waiving any claim that she might have that could possibly arise from the fact that she was represented by Mr. Cohn or Miss Levinson on your cross examination. That would then leave it in the posture of a professional problem posed to Mr. Cohn in the event that the Court should rule -- overrule any claim on your part of an attorney client privilege. There would be no similar problem if you were cross examined by Mrs. Levinson -- Miss Levinson?

MS. LEVINSON: Ms. Levinson, your Honor.

THE COURT: Excuse me. With all those things in mind, you are advised that you will be called again after this case has impanelled a jury. You will be put upon the witness stand in the absence of the jury. Your determination to testify or not testify will be determined at that time. Under the circumstances and under the sanctions that I have called to your attention you may get down.

(The witness left the stand.)

jbbr 3

THE COURT: You are required to remain available in the courtroom subject to the subpoena -- in the courthouse, I should say.

MR.STOLZAR: Judge, may I ask that Mr. Hughey, that his limits be extended to my office, 350 Broadway, a five-minute walk from the courthouse. I will be there all day and Mr. Hughey will remain there subject to Mr. Cutner or Mr. Cohn's call should he be needed today?

THE COURT: Any problem about that?

MR. CUTNER: No, your Honor. Not as long as he is available to testify.

THE COURT: All right. Mr. Stolzar, he is paroled in your custody.

MR. STOLZAR: Thank you.

(Jury not present.)

JOHN DAVID HUGHEY II resumed.

THE COURT: Mr. Hughey, the trial of the case of United States against Swinton, 70 Criminal 230, has commenced.

There has been called to the Court's attention both through your attorney and the government as well as the proceedings which took place preliminary to the commencement of the trial this morning, that you have been subpoenaed here as a witness, that the government expects to address inquiries to you; that you have registered your Fifth Amendment protest to responding to the government's questions and that the government has obtained a valid order granting you use immunity under the statute by reason of which you have been advised by the Court that that removes the objection that you stated to giving testimony and that you are to be required to respond to proper questions that are allowed by the Court with the advise that the law provides sanctions to be imposed on those who disobey a court order and that those sanctions may include if obstruction of justice is claimed by the government and found by the Court, not only the civil contempt for disobedience of the court order but possibly also criminal contempt; that for a civil contempt you may be committed to the custody of the Attorney General or his authorized representative

for the duration of the trial; that for a criminal contempt you may be committed for a period of up to 18 months in prison, six months by action of the Judge with a jury or the longer period on a jury trial of the issue of criminal contempt.

You were given this morning an opportunity to confer with your counsel and after conferring with counsel indicated to the Court thatall these matters were clear to you and thatyou understand your position.

The government now wishes to conduct a preliminary discussion with you concerning some of the matters that it intends to elicit and you will be given an opportunity to demonstrate whether or not you will be obedient to the court order or otherwise.

You may proceed.

EXAMINATION

BY MR. CUTNER:

Q THE WITNESS: Before you even ask me any questions, my position is very clear. I believe that I have just grounds for not testifying in this case for the reasons I gave in my motion this morning and furthermore I have analyzed and faced this whole situation very deeply and very thoroughly and I realize that my conscience would not permit me to testify against Pat Swinton in this case.

THE COURT: You may put your questions, Mr. Cutner.

Q Mr. Hughey, I show you the indictment in this case, 70 Criminal 230, in this district, and I ask you if you are the same John David Hughey III named in that indictment?

A My position is clear. I stated my position and I am not answering your questions.

THE COURT: The Court directs you to testify in answer to that question.

THE WITNESS: I have given my reason for not testifying and it is a very personal reason in addition to the fact that I believe that I have a legal right not to and that is my position and for that reason I am not going to answer any questions.

THE COURT: You realize you are deliberately refusing to obey the Court's order?

THE WITNESS: Yes.

THE COURT: You may continue the questioning up to a certain point, Mr. Cutner, to have a sufficient record.

Q Mr. Hughey, you were charged in Count 1 of conspiring with Samuel Joseph Melville, Jane Lauren Alpert, Patricia Elizabeth Swinton and Johnathon Bernard Grell and you pleaded guilty to that charge, did you not?

(Counsel conferred with the witness.)

A My answer remains the same.

THE COURT: I direct you to make a response to that question, finding that your refusal is without just cause.

Will you comply?

THE WITNESS: As I have pointed out to you before it boils down to primarily a matter of conscience and it is my --

THE COURT: Will you comply?

THE WITNESS: My conscience does not allow me to answer these questions.

THE COURT: Apart from your conscience, will you comply or will you not?

THE WITNESS: I will not.

THE COURT: Any further questions?

Q Do you know the defendant on trial, Patricia Elizabeth Swinton?

A My position is the same.

THE COURT: I direct you to make answer to that question.

Will you comply?

THE WITNESS: I will not comply.

Q Was the defendant on trial, Patricia Elizabeth Swinton, part of a group which took actions to injure and destroy government property during the year 1969?

jbbr 14

A I am not answering that question for the reasons given.

THE COURT: I find that your refusal is without just cause and direct you to answer.

Will you comply?

THE WITNESS: I will not comply.

THE COURT: I accordingly adjudge the witness in contempt and I direct that he be forthwith confined for the duration of the trial.

The government may consider whether it is prepared to and desires to proceed on the basis of obstruction of justice by this witness.

Marshal, take the man in custody.

MR. STOLZAR: For the record, I am Martin Stolzar, Mr. Hughey's counsel. I would ask that you stay his being remanded to custody to give me an opportunity to seek bail pending appeal from the Second Circuit. I understand that the statute under which you have adjudged him in contempt does not allow for appeals in cases where the appeal is taken for delay or the appeal is frivolous. I do not believe that the appeal in this case is frivolous nor is it taken for delay.

Mr. Hughey will, if he is not granted bail, be remanded, merely for a short period of time. If the

government wishes to proceed in a criminal way, they can, after the circuit decides whether or not there is merit to the appeal.

So I would ask that you direct Mr. Hughey to perhaps remain in New York City or allow him to go back to North Carolina but that I be given an opportunity to apply to the circuit to get a stay of your order adjudging him in contempt.

THE COURT: You have the opportunity to apply to the emergency judge of the Court of Appeals. In the meantime, bail is denied. And the stay is denied.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By B Edwards
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA

-v-

JOHN DAVID HUGHEY, III,

Defendant.

STIPULATION SETTLING RECORD ON APPEAL

76 Cr. 496 (TPG)

----------X

IT IS HEREBY stipulated and agreed that the following shall constitute the record on appeal for the instant cause:

Document	Filed by	Date filed
1. Defendant's Motion to Dismiss	Defendant	8/6/76
2. Affidavit in Opposition	U.S.A.	8/31/76
3. Order to Show Cause and Affidavits to Quash Subpoena of Hughey in U.S.A v. Swinton, 70 Cr. 230 (M.P.)	Defendant	9/22/75
4. Affidavit of Stolar	Defendant	9/21/76
5. Transcript of Proceedings	Stenographer	7/22/77
6. Docket Sheet, 76 Cr. 496 (TPG)	Clerk	
7. Letter of Joanne Harris dated 12/28/76	U.S.A.	12/28/76

Dated: New York, New York
August 15, 1977

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July 22, 1977 (extract)

GRIESE, District Court Judge:

The only point that I wich to discuss further is the double jeopardy point. Hughey and Alpert make slightly different arguments on the double jeopardy point, but I don't think it's terribly useful to separate them, and I will treat the issues in both cases as the same except for some -- at least I will treat the legal issues the same. There are some factual distinctions which I will note. The basic position of the defendants is that when they were sentenced to prison during the Swinton trial in September, 1975, that penalty was in substance a criminal contempt penalty, and that they cannot be charged again with criminal contempt because this would violate their rights against double jeopardy. They both recognize, as the record makes perfectly clear, that Judge Pollack described the proceedings employed by him as "civil contempt".

He warned about possible additional future proceedings of criminal contempt.

However, defendants urge that this nomenclature is not conclusive and that despite the label placed upon the proceedings by Judge Pollack, nevertheless, the substance of the proceedings made them criminal contempt.

They rely on certain cases which indicate that the unique earmark of civil contempt is that it is intended to force obedience to a court order, and that the defendant or the subject of a civil contempt proceeding, if it is indeed a genuine civil contempt proceeding, has the right to purge himself of contempt, has the right to relieve himself of the penalty and to releave himself from prison, if that is the penalty, by taking the step of obeying the order of the Court.

In other words, the unique earmark of a civil contempt is so to speak that the subject of the contempt has the keys to the jail in his hands. That is the phrase that is often used.

The complaint about Judge Pollack's proceedings is that Judge Pollack did not expressly state to either Alpert or to Hughey their right to purge themselves of contempt and to release themselves from jail or prevent an imposition of jail penalty by obeying the Court order.

It is this alleged failure on the part of Judge Pollack that is complained about as turning what Judge Pollack called civil contempt into what was in fact criminal contempt in the view of these defendants.

I have, of course, read the record before Judge Pollack. I don't believe that I need to summarize it. It is a brief record and it speaks for itself. It is perfectly true that Judge Pollack did not in so many words say that at any moment the defendants could reduce or eliminate the penalty by obeying the Court order. He imposed the penalities in the Alpert and Hughey situations without using that express language.

In the case of Alpert, he stated that the maximum period of confinement under the civil contempt order would be the life of the court proceeding then before him. At another point he said that he confined her for the life of this court proceeding.

However, he specifically noted the statute under which he was acting, that is 28 USC Section 1826. Alpert was represented by an attorney, so that the citation of the statute was clearly a meaningful act. That statute provides expressly that whenever a witness in any proceeding in a court of the United States refuses without just cause shown to comply with an order of the court to testify, the court

may summarily order confinement until such time as the witness is willing to give such testimony.

Now, the words used in dealing with Hughey were slightly different. Judge Pollack didn't use the words "maximum period of confinement." He simply ordered Hughey confined for the duration of the trial. And in connection with Hughey Judge Pollack did not specifically refer to the statute by number.

However, his attorney, Mr. Stolar, indicated that he was familiar with this precise statute because he stated, and I quote: "I understand that the statute under which you have adjudged him in contempt does not allow for appeals in cases where the appeal is taken for delay or the appeal is frivolous." The reference obviously was to the very statute I have mentioned, that is, 28 USC, Section 1826.

It is perfectly clear also that Mr. Stolar was aware of the legal provisions regarding civil and criminal contempt because in his papers on the appeal which was later withdrawn, he speaks expressly of the concern about a future criminal contempt and the need to have the civil contempt proceeding appealed from, so as not to leave unresolved problems for a later criminal proceeding.

Getting back to the Alpert situation again, I have no doubt whatever that the competent counsel for Alpert who advised her and who was in court with her fully understood the right to purge under 28 USC Section 1826.

In the course of these motions I have gone so far as to take testimony in the Alpert case as to the precise understanding Alpert and her then attorney had and I would find on the basis of this testimony unquestionably that Alpert fully understood her right to purge herself in the civil contempt proceeding, and certainly that her lawyer had such an understanding of his client's right to purge.

I further find on the basis of that testimony that the right to purge was regarded as entirely academic by Alpert. She has admitted candidly that she had no intention whatever of testifying, regardless of the right to purge, and so it was a matter of no consequence to her. Her determination was irrevocable that she would not testify.

I held a hearing in the Hughey matter to see if witnesses would testify on these subjects and Hughey invoked the attorney-client privilege and also his privilege against self incrimination, so there was no testimony by Hughey, and I did not pursue the matter with Mr. Stolar, who is counsel here, as well as being counsel for Hughey in the proceeding before Judge Pollack.

But again, I have not any doubt whatever that Mr. Stolar himself, as Hughey's attorney, was fully aware of the right to purge. I think it is absolutely clear that Hughey was not in any way deprived of the right to purge by lack of information. I think it is perfectly clear that there was an irrevocalbe decision on the part of Hughey not to testify and he was in no way misled into believing that he did not have the right to purge himself of contempt by obeying the Court order. I am perfectly sure that in the case of Hughey, the right to purge was an academic matter. His determination was the he would not testify in any event.

The conclusions I reach on the double jeopardy motions and are as follows:

The proceeding before Judge Pollack was unquestionably a civil contempt proceeding. Judge Pollack carefully stated that he was engaged in civil contempt proceedings and he carefully warned both Hughey and Alpert of the possibility of additional proceedings in criminal contempt if they persisted in refusing to obey the court orders to testify.

The government has been intent in the motions before me to avoid any confusion as far as the basis for my ruling on thest double jepoardy motions. What I refer to is the fact that the government has contended that it is irrelevant whether or not the defendants here knew or did

not know of their right to purge themselves. I think it is the government's position that it is irrelevant whether their lawyers knew or did not know of their clients' right to purge. The government has insisted throughout the proceedings before me that the matter should be entirely decided on the record, the court record before Judge Pollack, without making factual inquiries about the state of mind of Alpert and Hughey or their counsel or communications or conversations among them.

I think basically the government is correct that the matter should be determined on the basis of the record, on the basis of the statements and rulings of the court on the record at that time.

I want to say that I conclude on the basis of that record before Judge Pollack without any other factual considerations that the proceedings were civil contempt proceedings, and that the bringing of these criminal contempt proceedings is not barred by double jeopardy.

On the other hand, I am also constrained to repeat what I have already stated, that to the extent that facts about the understanding of Alpert and Hughey as to their rights are relevant, to the extent that such factual considerations are relevant, I think that the record conclusively shows that Alpert understood she had the right to

purge herself and had no intention of availing herself of that right.

I have no direct evidence that Hughey understood his right to purge himself, but I am perfectly clear that such right was an academic matter to him, because he unquestionably had decided to refuse to testify. There is not the slightest indication that he had any interest in purging himself of contempt.

As far as the attorneys, there is no doubt but that both of the attorneys, both of Alpert and Hughey, understood the right of their clients to purge themselves.

Again, all motions by Alpert and Hughey for dismissal of the indictments, all such motions are denied, and the application for Hughey for further discovery about surveillance is also denied.

MR. MARTIN: Your Honor, I don't want to reargue in any sense. There is one argument that we made. It was not treated in your opinion and I think for the sake of the record it would be appropriate for me to address that.

THE COURT: Okay.

MR. MARTIN: Because I think that there might be some basis as to what we argued, later. Obviously what we argue was the purge and the failure to have a purge clause was some indication that this was a civil contempt. I think,

however, we had a situation totally distinct from Hughey which we also raised, and that is the fact that at the time Miss Alpert came before Judge Pollack she was in jail then serving a term; and that Judge Pollack's statement that her term on this contempt was to be consective --

THE COURT: I'm aware of that. I really am sorry to say I didn't think that was worth addressing. It is perfectly standard in a civil contempt proceeding against somebody to add to their confinement; and they can purge themselves by obeying the court order and thereby reducing what is added. It is just that simple.

MR. MARTIN: So I won't reargue what we argued in our brief. I just want the record to be clear that that point was considered.

THE COURT: The record is clear and I'm sorry I didn't address it.

We have to address ourselves to the proceedings which remain. I take it that I am now in a position to render a verdict as far as Alpert because there is -- the case is fully submitted; isn't that right?

MR. MARTIN: That is correct, your Honor. And Miss Alpert is in Court so that we don't even have any question as to doing something in her absence.

MR. STOLAR: Judge, before you do that, can I just

ask you a question? Does what you dictated constitute your findings and conclusions on the question of the pretrial motions, or do you intend to file anything in writing?

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THE COURT: This is it.